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ABSTRACT

In a speech given to judges, public officials, law teachers, lawyers, and students at the East China Institute of Politics and Law, Shanghai, the author discusses the U.S. Constitution. The U.S. Constitution made possible energetic government by majority rule, while also securing individual rights in their appropriate sphere. Not only does the U.S. Constitution provide for citizen voting to assure that public policy will substantially reflect the will of the people, but citizens are also protected from arbitrary or unfair government actions. It is important because people are generally happy when they can organize their energies to pursue objectives they personally value and believe worthwhile. The second reason is that it releases enormous creative energy. The author then goes on to discuss four constitutional elements which contribute to liberty in our constitutional system: the rule of law, due process, guarantees of specific liberties found in our Constitution and its Bill of Rights, and the separation of powers. Another point, which is so important that it could even be viewed as a fifth feature which contributes to liberty, is the fact that courts provide redress even to politically powerless individuals, redress to have their claims heard according to law. The author concludes the paper with a brief description of several aspects of the U.S. political system. (Author/RM)

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THE U.S. CONSTITUTION: FOUNDATION FOR EFFECTIVE GOVERNMENT, FREEDOM AND CREATIVITY

by MARK W. CANNON

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(Speech given to judges, public officials, law teachers, lawyers, and students at the East China Institute of Politics and Law, Shanghai, Sept. 7, 1981.)

It is a fascinating experience to be in the People's Republic of China. We are interested in your mediation system. We are interested in the efforts being advanced at all levels of your government to develop a modern legal system. These efforts facilitate the development of an up-to-date economy operating increasingly in international commerce. Equally important, these efforts address the basic problem faced by every society -- how to protect essential and legitimate societal functions and needs, while at the same time allowing for individual freedoms with protections against arbitrary or abusive governmental action.

* * *

In this last area, the historic experience of the United States is interesting. That experience may teach some useful lessons, regardless of the particular social system which is considering this universal problem. Let me share a few with you.

Starting with only three million people on the east coast of our continent, and living in jealous, disunited communities and states, the people of our country in time equalled, and in some respects surpassed, the achievements of many great nations that

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existed when the United States was in its infancy. Some may ask, "What produced this unparallelled development?" There are obvious answers like the constitutional grant of power to Congress to regulate commerce among the states. This permits the nation's economy to grow without the adverse effects of local trade barriers. But less obvious, though equally important, is the notion that the Constitution made possible energetic government by majority rule, while also securing individual rights in their appropriate sphere.

Energetic government was provided for by constitutional grants of authority given to different branches of government. These distributions of power have legitimacy and support among the citizens because the Constitution was adopted by, and is from time to time changed by, the freely elected representatives of the people. Furthermore, the President of the nation and the governors of the states, as well as the legislators, must periodically be newly elected by the people in competitive elections. Finally, before laws are enacted, they are usually improved and refined by a process of wide public debate and hearings where all groups affected by the legislation can express their open criticism or support of proposed laws. These public hearings inevitably point out flaws and improve the effectiveness of legislation. While these democratic processes sometimes delay action, they legitimitize those actions and generally provide considerable public support for them.

Not only does the U.S. Constitution provide for citizen voting to assure that public policy will substantially reflect

the will of the people, but citizens are also protected from arbitrary or unfair government actions.

Why was it important to guarantee individual rights? First, this guarantee is important because people are generally happy when they can organize their energies to pursue objectives they personally value and believe worthwhile, provided these activities do not harm others. This is not to label these personal endeavors as necessarily selfish. Individual rights imply corresponding duties as well as freedoms; it is these duties of citizenship and consideration for others which permit social order and individual freedom to coexist in a free society. In fact, Americans have gone beyond basic duties to devote a great amount of their time, energy, and wealth to activities directed to helping others. They have done this on a voluntary basis.

The second reason for providing a wealth of individual freedom was that it released enormous creative energy. This, of course, is not anarchy; through the legal process society specifies its demands, and on occasion changes these demands through that democratic process. But beyond -- and because of -- these legal demands, people are free. In our nation the well-known practice has been that unless someone violates a specific law, he or she is free to experiment, to work hard, and to reap the rewards of these efforts. This has a way of energizing people. That is, people face life without fear of arbitrary external restraints not spelled out in the law.

Our history has been one of energetic experimentation with new ways of producing agricultural and other products. This vast river of creative energy has produced among other things: hundreds of thousands of new inventions; many new forms of intellectual and artistic expression; and many innovations in dealing with social, governmental and economic problems. This inventiveness, created by the freedom of our citizens, has attracted immigrants from around the world and has produced much of the technology which has transformed and elevated human life. As just one example, it has produced such an efficient food production system that three percent of the American work force can produce enough food for the entire American people as well as for many other of the world's peoples.

If this blend of energetic government and freedom spawned creative energy so beneficial to our society, what, you may ask, are the constitutional elements which contributed to it? Four important ones come to mind.

First, the rule of law. One aspect of this is that citizens may not be punished unless they clearly violate a specific law which was in force at the time of the alleged offense. The governing constitutional principle here is that, whether in civil or criminal matters, the state may act only when it is empowered by law to do so. Also, laws apply equally to all citizens including government officials. For example, in the United States, two former state governors have in recent years been imprisoned, not because a different party replaced them and punished them, but because they were convicted by unanimous 12-

member citizen juries, chosen at random. These were public trials for violations of law. Similarly, some federal congressmen and one federal senator have recently been convicted of accepting bribes. (An interesting aside is that nearly all of these officials were of the same political party as those who brought them to trial.)

These and other examples continually reassure the American people that even high officials are not above the law. Before the bar of justice they are ordinary people and must abide by the law no less than the most humble of citizens.

Second, our constitutional guarantee of due process assures each person that the government will deprive no one of life, liberty, or property without employing fair procedures designed to secure fundamental justice. This is the heart of our legal system. The principle here is that the evidence is weighed carefully before a person is deprived of his or her liberty or property by a court of law.

The third constitutional feature which has helped assure this system of freedom is the class of guarantees of specific liberties found in our Constitution and its Bill of Rights. These guarantees prohibit government from doing certain things. For example, a person cannot be convicted of treason except for the two offenses specifically mentioned in Article III of our Constitution. Likewise, the government cannot by mere legislative acts impose penalities and dispense with the judicial process. Other prohibitions range from restrictions on housing soldiers in private homes to bans against unreasonable searches

and seizures of persons, houses, papers and effects. Finally, two of the bulwarks of our Bill of Rights are the freedom of religion and speech clause and the clause guaranteeing equal protection of the laws to all citizens.

The fourth feature is somewhat more complicated. Permit me, then, to go into a little more detail. The feature I am now speaking of is the separation and independence of the Executive, Legislative and Judicial departments of power. One of the dominant conceptions of the statesmen who wrote our Constitution was that power needed to be fragmented so that they and their posterity could remain free of tyrannical rule. The separation of powers principle, said James Madison, one of our Founding Fathers, is an "essential precaution in favor of liberty."

The Framers' conception was that the three departments of governmental power ought to be separate and distinct so that power could not become monopolized. In theory and practice this involves considerable decentralization of federal authority. Powers not specifically granted to the national government are left to the states. Similarly, powers not delegated to the central government by the Constitution, nor prohibited by it to the states, are reserved to the people.

Dispersion of power is enhanced by provisions ensuring that checks are permitted on each national branch of government by the other two. For example, if the President concludes the Congress has made an unwise legislative choice, he can as Chief Executive veto the bill. By the same token, Congress can override the President if it concludes that the President was mistaken in

vetoing a bill, provided the legislators muster the constitutionally required two-thirds vote in each house. If the Congress disagrees with a presidential policy it can also modify the executive budget. Still another example is the President's power to make treaties, but only with the advice and consent of the Senate and provided that two-thirds of the Senators present consent.

How does the Supreme Court and the judicial system fit into this protective system of checks and balances? The Founding Fathers believed that our enduring freedom might depend on independent judges who could make decisions based on law without fear of political reprisal. Consequently, they put two basic features into the Constitution to protect federal judicial independence.

The first protection is judicial life tenure, subject to good behavior, which means that unless the House of Representatives votes to impeach a federal judge and then the Senate votes to convict that jurist of high crimes, the judge remains in office for life. Because federal judges are appointed by the President only after careful scrutiny and a public confirmation process by the Senate, the impeachment and conviction of judges has been very rare.

The second protection of judicial independence is that Congress may not diminish judges' salaries. This protects the judiciary against financial retaliation.

The use of the power of judicial review -- the power of the judiciary to determine the constitutionality and, therefore, the

validity of the acts of the other branches of government -- is recognized as a basic tenet of our constitutional system, and similar provisions have been adopted by many other countries. Only one congressional enactment was declared unconstitutional during the first half century of the existence of our constitutional government. In the last half century, however, with a higher volume of legislation, more congressional enactments have been declared unconstitutional by our Supreme Court than during the previous one hundred and forty years.

How many times has the Supreme Court dared to declare legislative enactments unconstitutional? In more than one hundred instances federal statutes have been ruled unconstitutional. In over one thousand instances state statutes have been declared unconstitutional. And in more than one hundred instances municipal ordinances have been nullified for the same reason. This does not give the judiciary the right to usurp the legislative power; it is intended to assure that the legislature may not exceed the bounds of the Constitution. Of course, if the people come to disapprove of a particular aspect of their Constitution, they can amend their supreme Charter according to the procedures established by the Founders.

I wish to make another point that is so important it could even be viewed as a fifth feature which contributes to liberty in our constitutional system. The point is implicit in what I have already said. I will now be explicit: Courts provide redress even to politically powerless individuals, redress to have their claims heard according to law.

Mindful of this point, let me briefly describe a few aspects of our political system as I understand it. The House of Representatives represents people on a one person one vote basis. Accordingly, that body tends heavily to represent populated areas. The Senate is composed of two senators from each of the fifty states. This assures that no geographic region, even though sparcely populated, will fail to have the same representation in this body of government as all other states. Of course, the result is that many western states small in population though large in size, like Wyoming, Colorado, Idaho, Utah, and New Mexico, are equally represented in the Senate.

Note too that statutes have reduced the amount of money that can go directly into a presidential candidate's campaign. Almost of political necessity, a president represents primarily those groups that are active and large, that comprise a majority constituency. The reason for delineating this power structure is to emphasize the different operations of the judicial system.

The Supreme Court represents no constituency. It represents only a devotion to the Constitution and the laws of the land. Let me give you two illustrations of how a single citizen can challenge the entire political system and win. Keep in mind, this victory is not political -- though, of course, it may have great political consequences.

The first example concerns a man named Clarence Earl Gideon. Mr. Gideon was a prisoner in Florida, quite far from Washington, D.C. The situation would not be altogether different from a person in your country who is under labor rehabilitation in a

remote commune. Without a lawyer, Mr. Gideon petitioned the Supreme Court. Basically, he argued that his constitutional rights were violated when a state trial judge denied his request for a court-appointed counsel. He made this request because he was too poor to afford legal counsel. The Court agreed to review his case. As often happens in our country, a prominent lawyer -- here Mr. Abe Fortas -- volunteered his time in order to assist this penniless man. The ultimate outcome was the requirement that all such persons be offered a lawyer before being tried, and if they are indigent the government must supply them a lawyer.

A second example involves a single citizen of the state of Georgia, Jim Wesberry. He felt that unequal voting representation for equal numbers of people was unconstitutional. That is, he was outraged that while his district had over eight hundred thousand people, it had only one congressman as did smaller districts with one-third to one-half the population. So he sued the governor of the state, Governor Sanders. The case finally came to the Supreme Court through the appellate process. In the end, this lone citizen prevailed over his state.

Lastly, the Founders placed certain checks on the courts. For example, a statutory interpretation can be overridden by a new enactment of Congress signed by the President. The amendment process permits the people to override even a constitutional holding by the Supreme Court. Moreover, the Framers provided some power -- though it is not altogether clear what kinds and how much -- to Congress to alter the jurisdiction of the federal courts. Additionally, the democratic process expresses itself

through the selection of new judges. At the Supreme Court, this occurs on the average of every twenty-two months.

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In conclusion, though I suspect that to some people around the world our constitutional system seems complicated and may be a little difficult to understand, it actually has worked well for us in assuring that the government represents the will of the people, and in preventing any single branch or individual from gaining full control of the national government. Importantly, this has protected our people against arbitrary or tyrannical government. The principle has served us well; whenever any branch of government begins to abuse its authority, the other branches mobilize against it in order to preserve our constitutionally guaranteed freedoms. These freedoms have encouraged untrammeled thought, communication and experimentation. They have also contributed to countless developments in science, technology, the arts, and human relations.

At heart, the process has worked well because of the benefits it has bestowed. The process has endured because of Americans' devotion to the system of ordered liberty and because of their commitment to the great Charter of the people -- the document we know and cherish as our Constitution.

I look forward to the day when the people of your government visit us and explain the latest developments in your new legal system. We will be as interested then as we have been thus far during our visit with you. Thank you.